The Future of Uniform Laws—The Commercial Code

FRANK E. HORACK JR. *

The National Conference of Commissioners on Uniform State Laws plans to promulgate the Commercial Code in time for its adoption by the states in 1951. The Code is the Conference's most ambitious undertaking to date. It unifies and codifies most of the law relating to mercantile, security, investment, and bank transactions. It includes the law formerly included in the Negotiable Instruments Act, the Sales and Conditional Sales Acts, Warehouse Receipts and Bills of Lading Acts, Trust Receipts, Bank Collection and several other uniform laws.

Its size and ambitious coverage of subject matters have posed innumerable policy questions for the Commissioners and have raised question if not doubt as to the probability of its widespread adoption. In the first place, the code departs substantially from contemporary Conference tradition. "Short Acts," Commissioners have admonished, "are much more readily passed by legislatures than long ones . . . ." [1] But the Code is long and includes all but a few of the most important and most frequently adopted uniform acts. Secondly, the Conference in recent years has accepted the role of defender of "states' rights" against the encroachment of federal authority. But the Code is drafted in anticipation of both federal and state adoption. Finally, the Conference has maintained strict independence of all other bodies and agencies. But the Commercial Code is the joint project of the Conference and the American Law Institute. Thus, the offering of the Commercial Code to the states will be a test not only of the validity of the policy determinations of the draftsmen but also of the fundamental postulates of Conference operation and procedure.

That these procedures deserve a test provided by a different philosophy of operation is indicated by the fact that in the more than 50 years of Conference history only one act has received unanimous adoption [2] and only five acts have achieved substantial uni-

* Professor of Law, Indiana University. Commissioner on Uniform State Laws.

[1] Young, *Achievement of Uniform State Laws*, 1927 HANDBOOK, CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 441, 447.

[2] UNIFORM NEGOTIABLE INSTRUMENTS ACT.

formity.[3] The great majority of Conference proposals have been adopted in much less than one-half of the states.[4] This record suggests that some experiment in method is justified. It is not intended, however, as a picture of defeat or a prediction of future failure.

The Conference itself is an organization of great inherent strength. Its personnel, recruited from the bench, bar, and classrooms of the 53 jurisdictions, encompasses the social, economic, and political experience of rural and urban societies and the contrasting viewpoints of a geographically diverse nation. The personal scholarship, industry, and integrity of the Commissioners have produced an informal legislative body of unmatched competence. Individually and collectively the Commissioners have performed their duties with a responsibility which assures not only a quality product but also reflects a high sense of public duty in its manufacture.

WHY SHOULD STATE LAWS BE UNIFORM?

In many areas of regulation there is in fact no need for uniformity. Diversity in social, political, and ethnical background, contrast in economic organization, and variation in climatic and geographic circumstances may even make uniformity in some areas of the law undesirable. But the integrating factors of transportation, commerce, and national unity, to a very large degree, dictate that common-law traditions and institutions are more likely to be similar than dissimilar and that diversity of law between the states

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[3] UNIFORM WAREHOUSE RECEIPTS ACT (52); UNIFORM STOCK TRANSFER ACT (46); UNIFORM NARCOTIC DRUG ACT (43); UNIFORM SALES ACT (37); UNIFORM VETERANS GUARDIANSHIP ACT (37); and even of these the Uniform Narcotic Drug Act, the Uniform Sales Act and the Uniform Veterans Guardianship Act have been submitted in revised form so that the uniformity between the states is not as great as would appear.

[4] Of the 53 acts listed as uniform in the 1945 Handbook only 15 have been adopted in 25 or more of the 53 jurisdictions. In addition to the uniform acts, 15 acts are listed as model acts and four have been placed on the inactive list. For an excellent analysis of the first 50 years of Conference operation, see Schnader, President's Address, 1940 HANDBOOK, CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 35; 1941 HANDBOOK, CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 38. Uniformity might be achieved " by getting all of the courts to commence over again and follow the decisions of some one court. The difficulties in the way of doing this readily suggest themselves to the lawyer who has ever attempted to get a court to overrule a former decision, or who has ever applied for a rehearing One of the greatest troubles would be in getting all the others to follow the one. Each one would think itself the one to be followed and not the one to follow. * * * It is clear, then, that in order to bring about the desired uniformity we must have not only legislation by Congress, but legislation by the legislatures of the different States." Tompkins, *The Necessity for Uniformity in the Laws Governing Commercial Papers*, 13 A.B.A. REP 247, 261, 262 (1890).

is more likely to be the result of accident than of reason. In a nation with essentially common customs, uniformity on the basic postulates of law and government is to be expected and diversity to be viewed with suspicion.

Uniformity, however, speaks at several levels—uniformity of substance, of procedure, of administration, of judicial decision, even of community support. Diversity of substantive law is amazingly small when the size of the nation is considered and the independence of 49 legislative bodies is emphasized. Indeed, whether the diversity be judicially or legislatively created, the slight but almost infinite variations are the hazard which lawyers and business men fear. It is not the log but the unseen sturdy vine which trips the unwary traveler. Because it is the lawyer who must guide the merchant on the trail, the clearing of the path has been his primary concern. Elimination of judicial variation has never come easily except by statute and thus the lawyer has sought legislation as a means of achieving uniformity. Uniformity of substance through uniformity of statutory expression seemed to offer the surest way of achieving uniformity of judicial interpretation and thus it was easy for the Conference to accept the practice of measuring its success in terms of uniformity of statutory expression.

Uniformity for Uniformity's Sake

Perhaps this is only another way of emphasizing the Conference's reliance on form, but in addition it implies belief that uniformity is a good in itself. Certainly in many areas this cannot be denied; for example, wherever a legal question arises in a conflict of laws situation the existence of the same rule in the several states greatly simplifies the lawyer's problem and increases the certainty of the law. But where no conflict situation arises uniformity of rule is of less concern except for those individuals who assume the responsibility of acting in a multiplicity of jurisdictions. Here, uniformity of law is convenient though hardly essential. The groups concerned, however, are large: the commercial and mercantile interests, the transport and communication services, and the agencies of government itself.

Nevertheless, uniformity may frequently imply excessive stability in that it places a heavy sanction on the retention of the uniform law and an avoidance of experimentation with new and perhaps better legal controls. Certainly no state could afford on its own to make the changes in the Sales Act or Negotiable Instruments Act which the Conference is now anticipating in its new Commercial Code and yet those changes reflect a substantial improvement in the concept of legal regulations synthesized with business practice. An attempt to resolve this desire for certainty with the desire for change presents the age-old conflict between

the law of precedent as understood in the case law and the desire to make the law reflect a changing social order. It is perhaps for this reason that the Conference itself has always characterized itself as a conservative body [5] which should not enter into controversial fields of legislation but should rather await the resolution of the controversy and then proceed to unify the experiment. The fear is that at this point unification is impossible and the proposal of a uniform law comes too late.

Proper Subject Matter

The above assumption that the Conference should propose a uniform act only after agreement has been reached among the states has, perhaps, been the greatest single retarding force in the success of the Conference. While there will certainly be controversy between those who see the lawyer as a skilled artisan and those who vizualize the lawyer's function as participating in and giving direction to policy, there will be little argument over the fact that the Conference has not achieved results when it has proposed uniform laws in advance of the crystalization of policy within the states. Thus, the Conference offered and then withdrew such acts as the Agricultural Cooperative Association Act which had but one adoption, The Airports Act which had two, the Aeronautical Regulatory Act which had three, The Automobile Liability Security Act which had three, and the Public Utilities Act which had no adoptions.

The Conference, therefore, assumed that if it entered areas where policy was more stabilized the chance of uniformity was enhanced. It recognized that in some areas of stabilized policy, local situations made uniform adoption unlikely. As Commissioner O'Connell pointed out, the Mechanics Lien Act ". . . will be impossible of passage in practically any of the states of the union. The law is pretty well settled in every community. . . . the Mechanics Lien Law cannot be universally applied in this country. The building of an hotel in Atlantic City is brought about under conditions that never could obtain, for instance, in Oklahoma or San Francisco." [6]

Likewise, the Committee on Review and Revision of Uniform and Model Acts in recommending that the Child Labor Act be declared obsolete said, ". . . no states had legislation touching this subject since conditions of employment vary substantially in the

[5] "The Conference has always been characterized by conservatism and doubtless its best traditions in this regard will be preserved, as they should." Terry, President's Address, 1914 Handbook, Conference of Commissioners on Uniform State Laws 106, 118.

[6] 1932 Handbook, Conference of Commissioners on Uniform State Laws 47.

several states, uniformity of adoption is unlikely." [7] Likewise the Conference engaged in considerable face-saving by reclassifying at the same meeting seven acts as model acts; in other words, they thought the Acts good but not likely of general adoption. A review of the acts and their prior successes certainly justified the judgment of the Conference.[8]

If the Conference is correct in its conclusion that its effectiveness is limited primarily to the narrow field where local conditions do not require variation in legal rule, where policy has stabilized, and where jurisprudential innovations are not involved, what then is left? On the one hand there remain areas in which states have in fact achieved substantial statutory uniformity, and on the other, areas unregulated by statutes but within the classical common law.

It is at this point that it appears that the Conference has made two serious errors in judgment concerning its own achievements: first, that its success has been in the field of commercial law because of the subject matter involved; and second, that its success has been with short acts rather than with long ones.

It is true that the uniform statutes which have achieved greatest uniformity have been commercial acts. But the reason for this success is not so much because the subject matter of the act related to commercial transactions which, because of their very nature, demanded uniformity, but because at the time of the proposal and adoption of the Negotiable Instruments Act and of the Sales Act the great majority of the states had no statutory law upon the subject. Other uniform acts in the commercial field have never achieved the success of the original three.[9] The Arbitration Act has had but six adoptions; Public Corporations Act, four; Business Records Act, 14; Fiduciaries Act, 20; Fraudulent Conveyance Act, 18; Insurers Liquidation Act, eight; Joint Obligations Act, five; Limited Partnership Act, 16; Unauthorized Insurers Act, four; Vendor and Purchaser Risk Act, six; Written Obligations Act, two. Some non-commercial acts have fared much better. The Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings has had 27 adoptions; Desertion and Nonsupport Act, 21; Criminal Extradition Act, 24; Declaratory Judgments Act,

[7] Also, UNIFORM CRIMINAL STATISTICS ACT (1 adoption); UNIFORM PUBLIC UTILITIES ACT (no adoptions); UNIFORM DIVORCE JURISDICTION ACT (1 adoption). 1943 HANDBOOK, CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 147, 151.

[8] UNIFORM INTER PARTY AGREEMENT ACT (four adoptions); UNIFORM JOINT OBLIGATIONS ACT (five); UNIFORM EXPERT TESTIMONY ACT (two); UNIFORM COMPOSITE RECORDS AS EVIDENCE ACT (two); UNIFORM BUSINESS CORPORATIONS ACT (four); UNIFORM WRITTEN OBLIGATIONS ACT (two); *Id.* at 152.

[9] The UNIFORM WAREHOUSE RECEIPTS ACT, the UNIFORM NEGOTIABLE INSTRUMENTS ACT, the UNIFORM SALES ACT.

23; Federal Tax Lien Registration Act, 24; Judicial Notice of Foreign Law Act, 20; Narcotic Drug Act, 42; Proof of Statutes Act, 27; Simultaneous Death Act, 26; Stock Transfer Act, 40; Veterans' Guardianship Act, 36. Thus, it appears that it is not the commercial character of the subject matter that has insured a high percentage of adoptions but rather the timing of Conference proposals to fit the needs of codification. In other words, at that point of time when the public and practitioners alike are prepared to crystalize, with some modification to be sure, the common law of a given subject matter, the chance of general adoption of a proposed uniform act is greatly enhanced.

Tests of Uniformity

In determining uniformity the Conference has considered as uniform only those state statutes whose titles conclude with the phrase "and to make uniform the laws thereof." Thus, state acts substantially similar in substance but not following the language of the uniform acts have not been accepted as "uniform" by the Conference. This means that in a considerable number of states statutes similar to the uniform acts are not recognized as uniform; yet in these states there is little or no possibility of the adoption of uniform acts. Legislatures are quite properly concerned with matters of substance, and they have neither the inclination nor the time to tidy up formalistic variations in statutory expression, when the substantive effect is negligible.

It seems clear that the Conference should examine all enactments within the areas of their own promulgations and determine those state acts in substantial conformity with their own and treat them as uniform. The Conference should concentrate its efforts for adoption in those states where basic conflict occurs between the local legislation and the uniform law, and in those states which have no statute. If substantial but limited variations exist between the uniform act and the law of a particular state, attempts should not be made to seek the enactment of the uniform act, but instead specific amendments should be drafted by the Conference to achieve more complete uniformity in the individual state.

Beginnings in this direction were made in 1947 when Commissioner Bogert recommended that the Conference should ". . . learn to what extent the fields covered by uniform legislation were already treated in statutes, although the uniform acts were not adopted, so that commissioners might be aided in deciding what uniform laws were needed in their several states." [10]

An analysis of these variations, even limited to areas in which uniform legislation exists, is an ambitious undertaking and one that might well be subsidized with a full-time research staff. Such a sur-

[10] Circular letter to Commissioners, August 17, 1948, p. 4.

vey will inevitably lead to Conference-sponsored amendments to eliminate substantial variations in particular states. With codification in many of the traditional common-law areas already achieved in most of the states, piecemeal substitution of individual uniform acts is not likely to achieve greater success in the future than it has in the past. Specific amendments or area-wide recodifications, such as the Commercial Code, are the only alternatives.

A second and long-term consequence of a full scale Conference survey would be the publication of a compilation of the laws of all the jurisdictions in the areas covered by uniform acts setting forth the state statutes both uniform and nonuniform. Such a manual would serve the cause of uniformity in two ways. It would make available the statute law of every jurisdiction and, though not creating uniformity in itself, would tend to eliminate many of the unexpected pitfalls which are one of the primary curses of diversity.[11] Secondly, such a volume would tangibly portray the nonconformity which today is discoverable only by the difficult process of identifying the states which are not listed as having adopted uniform legislation. Psychologically the volume itself would be the best argument for uniformity. Finally, such a compilation might open the way for a modern Stimson.

Until that happy goal is reached the Conference must recognize that on the one hand it claims too much when it accepts credit for all acts with "uniform titles", and on the other claims too little when it excludes from its calculations those state acts which in all but a few particulars are blood brothers with uniform acts. The test of uniformity must be forever uniformity in the fact of operation and not in the form of expression.

Uniformity Through Federal Action

The reports of the proceedings of the Conference for the past 20 years give no hint that uniformity may be achieved in any other manner than by the adoption of uniform laws. The reports are eloquent with expressed fears of federal encroachment on the domain of the states and of the need of *Thermopylaete* to stay the attack. Such attitudes, however, were not held by the American Bar Association nor by the Conference at the time of its formation.[12] The opinion was general that codification and uniformity were to be pursued with vigor, limited only by the dictates of the subject matter and constitutional limitations.[13] Federal enactment, interstate

[11] "The annoyance arising from various and conflicting laws seemed common to all the states . . . ." Brewster, *Report, Committee on Uniform State Laws,* 14 A.B.A. Rep. 365, 367 (1891).

[12] *Id.* at p. 373.

[13] 13 A.B.A. Rep. 247 *et seq.* (1890); Snyder, *The Problem of Uniform Legislation in the United States,* 15 A.B.A. Rep. 287 (1892).

compact, interstate codes and uniform laws were all means of equal merit for the achievement of uniformity.

In 1890 the Conference reported that it had carefully considered federal enactments and felt that they provided "only a partial remedy" and "in order to bring about the desired uniformity we must have not only legislation by Congress but legislation by the legislatures of the different States." [14]

In 1890 Mr. Brewster in summarizing objections to the program of uniformity in marriage and divorce laws said:

> The first objection raised is the fear that a systematic movement in the direction of uniformity may destroy the autonomy or at least the individuality of the states—that even a self-imposed uniformity tends to centralization, and is opposed to the excellent principles of local self government. We believe this apprehension is unwarranted. . . .[15]
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> Another objection asserts that the results of uniformity can better be advanced and permanently secured by national unification—by Congressional action, and, if necessary, by constitutional amendment—than by separate state action. That this method would have the advantage of more complete uniformity and permanency, if it were practicable, must be admitted. But the inseparable difficulties in the way of positive national action, at present, are so apparent . . . that this alternative is really out of the question.[16]

In fields other than marriage and divorce there was also demand for national action and Mr. Brewster reported, "Two or three members of the Committee were of the opinion that on some of the subjects referred to us unification by Congressional action was preferable to uniformity by state action." [17]

It is clear indeed that in these formative days the Conference and the American Bar Association saw no serious danger in uniformity gained through federal action, but rather felt that if federal jurisdiction extended into fields where the Conference thought uniformity desirable that federal legislation was the preferable means of achieving their goal. It was not until 1892 that the state sovereignty argument presented itself and even then it seems to have been offered more as an argument to goad states into action than as an argument against Congressional legislation.

> The problem of uniform legislation, therefore, *so far as relates to those subjects not delegated to the United States or to Congress,* must be solved, either by the States surrendering more power, or by exercising it with uniformity in their several legislatures.[18] (Emphasis supplied.)

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[14] *Supra* note 5.

[15] Brewster, *Report, Committee on Uniform State Laws,* 14 A.B.A. REP. 365, 370 (1891).

[16] *Supra* note 15, at 373.

[17] *Supra* note 11, at 366.

[18] *Supra* note 13, at 288.

In spite of the political capital that has been made of the threat of federal encroachment, the jurisdictional line between the federal government and the states has been adhered to substantially as marked out originally in the Constitution. The so-called expansion of Congressional power has not been legal or political expansion but simply a factual change in the nature of commerce—a change ever emphasizing the national character of commercial activity.

The predictions of 1789 have come true. As the Conference itself reported in 1898: "Science, and invention, steam, and electricity know nothing of state boundaries. . . . The strong tendency toward urban life, the centralization, and consolidation of all methods of interstate commerce, and business intercourse of every kind, . . . all unite to wipe away the provincial differences of former days."[19]

This theme reoccurs in the address of President Harno in 1948 when he asserted: "I wish to disavow any thought of making a customary speech on states' rights. Emotional nostalgia should not confuse our thinking as we appraise the problem. . . . Maintaining a structure of a strong central government does not necessarily entail weakening in the structure of the state and local government." [20]

May it be hoped that the Conference is returning to the faith of the founding commissioners. The issue of federal-state jurisdiction at the legal level is one for the Supreme Court and not for the Conference and at the factual level it is for the people themselves as was well pointed out by Mr. Brewster in 1891 when he said: "Variance, dissonance, contradiction, nay, any unnecessary diversity in the 50 sub-divisions of the one American people in the general laws effecting (sic) the whole people in their business and social relations cannot but produce perplexity, uncertainty and damage."[21]

Today, even more than 50 years ago, it is to the interest of buyers and sellers, producers and wholesalers, investors and bankers, and to their lawyers, to have a single code of laws covering the transactions of commerce.[22] This is a mutual concern of both the states and the federal government. The adoption of the proposed Commercial Code by the national legislature is more in aid of, and auxiliary to, state regulation than in challenge to it. The cost of

[19] Brewster, *Uniform State Laws*, 21 A.B.A. REP. 315, 316 (1898).

[20] Harno, President's Address, Press Release 4, 8 (August 30, 1948).

[21] *Supra* note 11, at 371.

[22] "No matter what may be said for or against codification; no matter what fine-spun theories may be urged to discourage the use of written codes; no matter what plausible arguments may be brought to bear to show that the substantive law can never be embraced within a written code; nevertheless, the universal judgment of the commercial world has emphasized their necessity, and written codes have been adopted in about every civilized country on the globe." Snyder, *The Problem of Uniform Legislation in the United States*, 15 A.B.A. REP. 287, 308 (1892).

isolation is too high for the Conference or the states to cast aside the opportunity for unification of commercial law at all jurisdictional levels and for all transactions.

It is anachronistic for the Conference to urge the necessity of uniformity between the laws of the several states and to ignore the disparity between the laws of the states and the federal government. Inasmuch as federal legislation is potentially applicable in each state, the effect of federal diversity is much more keenly felt than disparity between the laws of the several states. Choice of law in the conflicts situation is much less a concern of the average practitioner than choice within a state between the possible applicability of state and federal law. Since *Guaranty Trust Co. v. York*,[23] the uniformity between state and federal law so imperfectly promised in *Erie Railroad Co. v. Tompkins* [24] appears to be a fading hope. Long ago the Conference itself recognized that uniformity through judicial action was impracticable [25] and it seems no more likely to provide the answer in the field of the state-federal relationships. It is clear that the Code presents the best thinking of the Commissioners of the several states; if Congress adopts their proposal it is much more logical to say that Congress is following the wishes and the lead of the states than that Congress has entered the field to interfere with state autonomy. The Conference should not quickly be persuaded by those interests who may raise the state-federal issue in order to mask their real opposition to the merits of the Code itself.

The Code v. Chapter Adoptions

In recent years the Conference has believed that legislatures enact short acts more readily than long ones, and that consequently, the Commercial Code should be broken into its component articles and chapters and offered for piecemeal adoption. Though frequently urged as a proper means of presentation,[26] such a proposal would insure the failure of uniformity in the commercial field.

Better the advice of Brewster:

> Uniformity, on any subject, to be of any permanent value, must generally be through Partial Codification, that is, putting into statutory shape the whole law on the particular subject matter to be unified. Tinkering, I suspect will not do. The tinker, although in, old times, a useful member of the community, had a rather unenviable reputation, chiefly, I suppose, on account of the lack of permanency in his patchwork.[27]

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[23] 326 U. S. 99 (1945).

[24] 304 U. S. 64 (1938). [25] *Supra* note 5.

[26] *Supra* note 1, at 447. "If a subject is divisible so that instead of one long act two or more shorter acts can be drafted their passage will be aided and enactment be more easily obtained."

[27] *Supra* note 11, at 372.

Splitting the Commercial Code would create internal disunity in its provisions. A state might adopt the chapter revising the law of sales, but not adopt the chapter on bills of lading; or it might adopt the negotiable instruments chapter but fail to adopt the chapter on bank collections. A commercial transaction cannot be dismembered. Even intrastate transactions would not be covered by a consistent body of law and those which transcended state boundaries would suffer perhaps even more than they do at present. The entire law relating to commercial transactions must be uniform, or no uniformity exists at all.

Brewster is correct; tinkering will not do. Piecemeal adoption will reduce the probability of adoption of all the pieces. As was pointed out earlier,[28] it was the need for codification rather than subject matter that caused the widespread adoption of the early commercial acts. Thus, if the need for codification is the reason for enactment, the Conference would retard acceptance by the states if it offered fragmentary parts of the code for adoption.

A short act normally is concerned with limited subject matter. It is likely to infuse new elements and to change the existing common law for a single situation and thus aggravate rather than simplify the work of the lawyer. Because of the narrowness of the subject matter the legislature will not view the proposal as sufficiently important to justify legislative consideration and lawyers will not support it, for it means greater diversity in their practice rather than simplicity, even if the act clarifies the law in a particular field. By its very narrowness it is likely to create peripheral doubt as to the common-law or statutory rule in other areas and, although the Conference may feel at ease in having taken short and cautious steps with narrow acts,[29] it is likely to discover that the proposals will not meet with widespread legislative acceptance.

It is for these reasons that any proposal to present the code piecemeal should be looked upon with the greatest of suspicion. No approach other than outright opposition could be more calculated to insure the ultimate failure of the Commercial Code. Transactions in the business world are not divided up into the artificial segments with which lawyers so familiarly deal. A commercial transaction of any considerable importance carries with it problems of sales, financing, documents of title, negotiable paper, and a host of security devices, the legal effect of which the Commercial Code correctly attempts to treat in the same unified way as they are treated in the commercial world. If but a portion of the Code is offered for adoption, then the transaction which the business man must view as a unit will be carved by the lawyer's action into a multiplicity of

[28] See this article page 559 *supra*.

[29] *Supra* note 1.

parts none of which may be reassembled through piecemeal adoption.

THE PREPARATION OF UNIFORM ACTS AND CODES

Any generalization on this subject is likely to be both inaccurate and unfair to many of the draftsmen who have labored diligently and conscientiously in the preparation of acts for the Conference. Nevertheless, the conclusion cannot be escaped that most of the draftsmen, busy lawyers, judges, and professors, have had neither the time nor the staff to do the necessary research for a first rate drafting job. The historical and traditional assumption that good laws may be made by legislative fiat and do not need antecedent nonlegal research has hindered the effectiveness of all legislation including the uniform acts.

The deep chasm which only now is being bridged between the law and the society in which it operates has long stood as a barrier to effective legislative regulation. Here again, though it is customary to think of progress as a steady and uninterrupted advance, we discover that at the time of the establishment of the American Bar Association and in the early days of the Conference the relation of the statute law to the factual conditions of our society was better understood than through most of the years of this century.

As early as 1878 with the establishment of the American Bar Association, the lawyers of that Association directed their attention to the growth of law through legislation and commanded their president to report annually on "the most noteworthy changes in statute law . . . made in the several States and by Congress during the preceding year."[30] It appointed one committee to promote uniformity in the statutory law of the states [31] and another to encourage uniformity in procedure.[32] It assisted in the establishment of the Conference and, as it does to this day, provided major financial support to its program.[33]

Its concern with and understanding of the relation of law to society in those early days is best epitomized by a distinguished address made to its annual meeting in 1888. Mr. J. M. Woolworth said:

> I ask you to look at laws not as ultimate facts . . . but as a certain class of social phenomena. . . .
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> All the jural conceptions, legal institutions, judicial administration and methods of juridical logic of a people, . . . are reflected from the common morality, intelligence, industries, wealth, aesthetic taste, and other mental and moral

[30] A.B.A. CONSTITUTION, Art. VIII, 1 A.B.A. REP. 18 (1878).

[31] Originally as a part of the work of the Committee on Jurisprudence and Law Reform, 1 A.B.A. REP. 38 (1878).

[32] Committee on Judicial Administration and Remedial Procedure, *supra* note 31.

[33] Schnader, President's Address, 1940 HANDBOOK, CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 35 *et seq.*

> characteristics. The process of their moral philosophy have fed their theories of right; the exigencies of commerce, the products of adventurous enterprise, the contrivance of inventive skill, the accumulations of capital, and the aggressive demands of dissatisfied labor, compel laws which otherwise would be needless and impossible.
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> The whole series of illustrations which have been presented in this discursive way, brings out this great truth that the rules with which we are daily dealing and by which we guide our clients in their transactions and defend their rights, are not the contrivance of lawyers nor the construction of lawmakers. Nor are they accidents happening we know not how nor atoms having no fellowship. More than that, taken together they do not form a body of truths and principles, a system, a scheme, a science, with relations only to themselves, and beyond whose circumscriptions all other truths and principles are alien, with which they have no alliance. Law is a fact in the midst of the many other facts of society having relations to them all; on the one hand taking its conceptions, doctrines, principles, maxims and processes by refection from them, and on the other impressing itself with energy upon the history, structure, institutions and theories of the State. [34]

This underscoring of law as a social science found reflection in the Conference as well. In 1905 James Barr Ames, a figure more frequently associated with conceptualistic legal theory, having been appointed to draft the Uniform Partnership Act, declined to continue with the work unless the mercantile rather than the legal theory of partnership was accepted and stated:

> I have endeavored to bring before you my difficulty because it did not seem to me worth while to attempt to bring about uniformity in the law of partnership unless we attempted to get the mercantile idea of a partnership; I feel that so strongly that, if the Conference thinks my plan undesirable, I should much prefer to have some one else draw the act; I should have no heart in drawing an act on any other theory, and it would seem to me very unwise to stereotype in a statute so many anomalies as must be stereotyped if we attempt to enact in a law the lawyer's technical conception, which is in direct violation of the mercantile understanding.[35]

To an ever increasing degree the need for law to reflect social and economic conditions has become apparent. This need has increased the burden of drafting to the point that a single commissioner can scarcely undertake the drafting of even a simple act without doing a superficial job or seriously slighting his regular engagements. It is one of the reasons, though probably uncon-

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[34] Woolworth, *Jurisprudence Considered as a Branch of the Social Sciences*, 11 A.B.A. REP. 279, 280, 297-300 (1888).

[35] Ames, (discussing Report of Committee on Commercial Law), 28 A.B.A. REP. 732, 737 (1905).

sciously advanced, for the Commissioners' preference for short acts. On the basis of time alone, a comprehensive code is entirely beyond the capacity of any single Commissioner.

In spite of these obstacles the Commercial Code has returned to the early traditions of the Conference. It has been built upon the actual commercial and banking experience of communities large and small. This has required the cooperative effort of a staff of legal and economic researchers and skilled draftsmen. It has required a large body of official and unofficial advisers. It has required organization. The result is that prior to its presentation to the Conference and Institute the Code has been subjected to extensive and organized consideration, testing, and revision. Such a careful, thorough and scientific process is expensive. Were it not for the assistance of a far-seeing foundation,[36] the Code could not have been completed.

A review of the Commercial Code with its appended "notes and comments" discloses clearly the superior quality of a product produced by these methods.[37] It seems obvious that the future program of the Conference will tend more and more toward the promulgation of fewer acts—acts more comprehensive in coverage, more carefully prepared, and more extensively tested.[38] This program cannot be accomplished on a part-time basis by a few individuals who contribute generously of their time to the profession and to the public service. These individuals will still be needed. Their function, however, is at the reviewing and counselling stage. A full-time staff of legal and economic researchers must be maintained by the Conference.

A permanent staff may not be the solution, however. The scope of the subject matter in which the Conference is interested will make it a difficult task to find and retain personnel competent in such diversified fields as taxation, evidence, and commercial transactions. There must be flexibility in the staff.

Perhaps a small skeleton staff for routine work should be maintained on a permanent basis. However, the most effective work will be done through research grants to individuals who can take leave from their regular occupations for a few months or a year and who will have funds available to employ assistants of their own choos-

[36] Maurice and Laura Falk Foundation, Pittsburgh.

[37] CODES OF COMMERCIAL LAW (Student ed. 1948).

[38] Harno, *Report of Committee on Scope and Program,* 1945 HANDBOOK, CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS. "Often acts are approved that are poorly drawn. Expert draftsmanship is lacking. What is more, some bills show a want of study of background materials and research. The Conference should find means through which every question considered by it would be given thorough study and every bill proposed by it would be expertly drafted."

ing. Travel funds must be available for lawyers, judges, and professors who will act as consultants and who can meet in groups for thorough and intensive review of the work of the staff. Only in this manner can codes of comprehensive character be prepared with sufficient thoroughness to commend themselves for serious consideration by the legislatures.

The permanent staff will be occupied with the preparation of amendments to be proposed to the legislatures of particular states in order to conform their existing statutes to the substantive uniformity of the uniform acts.[39] This staff should also have the detail work of considering amendments to the permanent codes. None of the codes, no matter how expertly drawn originally, must be considered as completely permanent and final. Particularly if the codes are to reflect the business practice and the social and economic conditions of our society, they must be constantly reviewed in order that, as changes and improvements in business practice make need for change in the law, amendments can be prepared to assure the vigor and practicability of the code provisions.

The Future of the Code and Codes

It is apparent from the foregoing discussion that the Conference is in the midst of a substantial change of programming from the immediately preceding years. It is also clear that the philosophy behind the present program is not new but more nearly consistent with goals and the purposes of the Conference at the time of its founding. The research and the philosophy of the Code's draftsmen accord with Dean Ames' admonition that the "lawyer's technical conception" cannot be accepted when it is "in direct violation of the mercantile understanding." They have sought to discover the details and particulars of mercantile intercourse so that the rules accord with both the spirit and the mechanics of commerce. In matters of substance the Code is a substantial forward step in scientific legislative drafting.

Two policy hurdles remain. One relates to the form in which the Code will be offered for adoption; the other relates to the jurisdictions to which it will be offered for adoption. A review of past experience of the Conference, together with the understanding of the function of the Conference as it was understood at the time of its establishment, seems to indicate clearly that the Code must be offered *as a Code* and not piecemeal, and that it must be proposed to all legislative bodies having jurisdiction over commercial transactions within our borders. Unless both of these steps are taken it is difficult to predict genuine success for the endeavor. And should general enactment fail, the Conference will be in the unhappy pre-

[39] See text page 560 *supra*.

dicament of having made a partial experiment and will not know the cause of its failure. Conversely, if the Code is offered as a Code to all jurisdictions there are strong indications that its chances for success are considerable. In the first place, the best explanation of prior Conference success has been its ability to meet the needs for codification. When no such need existed, good Conference acts have not been adopted. When the uncertainty of the common law and the occasional and uncodified statute left lawyers in doubt as to the actual state of the law, uniform acts found ready acceptance. In the second place, codification on the broadest jurisdictional base not only will provide the widest uniformity but will contribute greatly to the achievement of total uniformity in all jurisdictions. The Conference cannot afford to reject this opportunity.

If the Conference takes this course and it is as successful as it would appear to be, then, the future of the Conference as an institution would seem to be assured and its future operation will continue along these lines: *First,* limitation of endeavor to substantial codes in fields where uniformity between the states is both practical and necessary. *Second,* a substantial reduction in the number of small and "tinkering" acts. *Third,* the establishment of full-time research staffs.

With such a program the Conference seems assured of making a contribution to the jurisprudence of this generation at least equal to that of the day of its great success with the Negotiable Instruments Act.